HAJIJAH BANA

v.

RAMLI USOP

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CIVIL APPEAL NO: 12-44-99-II]
20 MARCH 2000

TORT: *Defamation - Libel - Whether copy of defamatory letter was extended to Anti Corruption Agency - Whether words used in letter defamatory - Whether words calculated to expose respondent to hatred, ridicule or contempt in the mind of reasonable man or would tend to lower him in the estimation of right thinking members of society generally*

TORT: *Defamation - Defence - Fair comment - Whether each of the facts pleaded in support must be proven - Test - Whether fair minded person would have come to the conclusion as appellant did*

TORT: *Defamation - Defence - Fair comment and justification - Whether separate and different - Whether burden of proof for each is different*

TORT: *Defamation - Malice - Burden - Whether discharged*

A dispute arose over a piece of land ('the said land') between the parties who were from the same village. The appellant desirous of building a house on the said land obtained permission from the district officer ('DO'). The respondent who was the headman in the village was unhappy with the DO's said decision which allowed the appellant to build a house on the said land without his prior knowledge or permission and also that of the village's safety and development board. That culminated in a protest contained in a letter dated 26 November 1998 ('AD3') by the respondent, addressed to the mayor.

On being shown a copy of AD3, the appellant was incensed. She then asked her son to write a letter ('P1') to the respondent. At the bottom of P1 it was typed that copies were sent to seven authorities, including the Anti-Corruption Agency ('ACA')

The trial judge found that the appellant acted on malice and that that was reflected when P1 was copied to the ACA. For that reason, it was held that the defence of fair comment must fail.

The appellant appealed to this court against the said decision on the grounds, *inter alia*, that the magistrate had erred in fact and law in finding that the respondent had proven *prima facie* that the words complained of were defamatory, without properly applying the correct test in deciding the meaning of the said words. Further, that the trial judge had come to the decision by a mere fact that P1 was copied to the ACA.

Held:

[1] It becomes an actionable liable when three ingredients are proven, *ie*, that the words complained of: (i) are defamatory; (ii) referred to the respondent; and (iii) published to a third party.

[2] The trial judge had applied the correct test in determining whether the words were defamatory by applying the test as laid down by Lord Atkin in *Sim v. Stretch*, *ie,* that whether the words were calculated to expose the respondent to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower him in the estimation of right-thinking members of society generally.

[3] To succeed in the defence of fair comment, the appellant must prove that: (i) the words alleged to be defamatory were comments and not statements of facts; (ii) there was a basis for the comments; (iii) the comments were of public interest; and (iv) they were made honestly and without malice.

[4] It is not necessary that each of the facts pleaded in support is to be proved. All that is needed is to prove such of the facts as are sufficient to form the basis of a fair comment. The question to ask in that type of defence was whether on all these facts, a fair-minded person could honestly have come to the conclusion as the appellant did. The test is an objective one.

[5] The defence of fair comment on matters of public interest can be distinguished from the defence of justification. These two defences are quite separate and different, and the burden of proof for each is different. For the defence of fair comment on matters of public interest it is not obliged to be proved that the comments are true but are fairly and honestly made. Whereas for a plea of justification, it has to be proved that not only the facts are truly stated but also that any comments made upon them are correct.

[6] Where the defendant has pleaded fair comment, to which the plaintiff has pleaded malice in reply, it is for the plaintiff to adduce evidence of fact and matters from which malice is to be inferred.

[7] The respondent had not discharged the burden of proof that there was fact or facts from which malice was inferred, *ie*, the sending of a copy of P1 to the ACA. The letter P1 was never sent to the ACA although it was typed at the bottom of P1 that copies were sent to 7 authorities, including ACA.

[Appeal allowed with costs to the appellant.]

Case(s) referred to:
Abdul Rahman Talib v. Seenivasagam & Anor [1965] MLJ 142 ***(refd)***
Horrocks v. Lowe [1974] 1 All ER 662 ***(refd)***
JB Jeyaretnam v. Goh Chok Tong [1985] 1 MLJ 334 ***(refd)***
McCarey v. Associated Newspapers Ltd & Ors [1964] 2 All ER 335 ***(refd)***
Merivale v. Carson [1888] LR 20 QBD 275 ***(refd)***
Rajagopal v. Rajan [1972] 1 MLJ 45 ***(refd)***
Sim v. Stretch [1936] 2 All ER 1237 ***(refd)***
Sutherland & Ors v. Stopes [1925] AC 47 ***(refd)***
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1996] 1 MLJ 393 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 9

For the appellant - Sapuan Ahmad; M/s Idris & Co
For the respondent - Addy Termizi Mohd Tuah; M/s Marikan & Assoc

Reported by AG Kalidas

JUDGMENT

Muhammad Kamil Awang J:

The respondent had been defamed by the appellant's letter dated 4 December 1996 (exh. P1). At the trial, the appellant's defence of justification and fair comment had failed; in the latter the defence of fair comment failed because the court found that the defendant had extended a copy of P1 to the Anti Corruption Agency ('the ACA'). In the very words of the learned trial judge, she said (at p. 114 Appeal Record):

> However, I am unable to find that the plaintiff (appellant) was acting without malice on her part for making the said comments. Malice on her part is reflected when a copy of the letter was copied to the Anti Corruption Agency. For this reason, I hold the defence of fair comment must fail.

Brief Facts

A dispute arose over a piece of state land described as Lot 609, Block 6, Muara Tebas Land District ('the said land') between the parties who are from a village called Kampung Muara Tebas, about 30 km on the fringe of Kuching

City. There are pockets of unalienated state lands in the village, and the said land is one of them, which the land & survey had yet to determine its ownership. Desirous of building a house on the said land which she had occupied for one and a half years, the appellant obtained the permission to do so from the district officer concerned in a letter dated 22 November 1996 (exh. AB2). The appellant started to build a house on the said land, and a group of workers from Dewan Bandaraya Kuching Utara (DBKU) came to demolish the house but refrained on being shown AB2.

The respondent was a Penghulu in the village and he was unhappy with the district officer's decision that allowed the appellant to build a house on the said land without the prior knowledge or permission of the Jawatankuasa Kemajuan dan Keselamatan Kampung and him, which culminated in a protest contained in a letter dated 26 November 1996 (exh. AD3) which was addressed to the Datuk Bandar, DBKU. This is an administrative issue which could have been easily solved by the authorities concerned.

On being shown a copy of the respondent's letter AD3, the appellant was incensed, as it were an affront to her notion of justice, she then asked her son to write a letter (P1), which is the subject matter of the case, and for ease of reference it is reproduced below:

Hajjah Hajijah Binti Bana, 4.12.1996
Kampung Muara Tebas,
KUCHING.

Kepada: Penghulu Haji Ramli bin Usop,
Kampung Muara Tebas,
93050 KUCHING.

Tuan,

Tapak Tanah Di Lot 609 Blk. 6 Muara Tebas Land District (Kpg. Muara Tebas Kuching)

Saya ada membaca surat Tuan Haji bertarikh 26.11.1996 yang ditujukan kepada Datuk Bandar, Dewan Bandaraya Kuching Utara dan salinan kepada beberapa Agensi-Agensi Kerajaan termasuk orang perseorangan, suami saya, Haji Joss Haji Hashim.

2. Saya tidak faham kenapa Tuan Haji tidak membenarkan saya mendirikan rumah ditapak berkenaan sedangkan Pegawai Daerah, Kuching sudah memberi kebenaran melalui surat rasmi beliau bil. 22/DOK/163 bertarikh 22.11.1996 terlebih dahulu. Saya rasa pihak Pegawai Daerah lebih berkuasa dengan berlandaskan peraturan yang mana Tuan Haji mempertikaikan keputusan beliau. Menurut surat daripada Tuan Haji sesiapa individu tidak dibenar mendirikan rumah ditapak tersebut **tanpa** kelulusan dari Tuan Haji sendiri. Begitu besar

sekali kuasa yang ada pada Tuan Haji, sehingga membantah atau mengenepikan keputusan Pegawai Daerah, sedangkan perlantikan seseorang Ketua Masyarakat untuk menjawat jawatan Penghulu adalah cadangan atau sokongan Pegawai Daerah sendiri. Nampaknya, kata orang kita **'Lawan Towkey'**.

3. Setahu saya, seorang Penghulu tidak ada diberi kuasa sedemikian, cukup wajar untuk menyelesaikan masalah anak-anak kampung dengan bermuafakat, menjadi saksi atau berbincang dan bukan menyalah guna kuasa. Pihak Dewan Bandaraya Kuching Utara pun saya rasa tidak tergesa-gesa atau tidak mahu sewenang-wenangnya mengambil tanah orang, malah ada lagi kawasan sekitar boleh dipergunakan. Kenapa mesti tapak tanah yang akan bakal tempat saya hendak mendirikan rumah jadi persoalan.

4. Ketua Masyarakat yang menyandang jawatan Penghulu, seperti tuan Haji sendiri adalah dilantik untuk mengendalikan masalah kampung, sekiranya kurang pasti, patutlah dirujuk kepada Pejabat Daerah. Bukan membuat keputusan undang-undang ditangan sendiri atau menyalah guna kuasa. Walaupun setiap keputusan berasaskan keputusan jemaah Ahli-Ahli Jawatankuasa Kampung, patut juga dirujuk semula kepada Pegawai Daerah bagi mendapat pandangan beliau.

5. Pihak kami sedia berbincang dengan Tuan Haji sendiri atau dengan pangkat tercatat dalam surat tuan, Datuk Penghulu Kpg. Muara Tebas di hadapan Pegawai Daerah dan disertai bersama Datuk Bandar atau wakilnya untuk menyelesaikan perkara terbabit.

6. Akhir sekali adalah diharap pihak-pihak yang berkenaan dapat menyelesaikan perkara ini sebelum lebih rumit lagi kerana saya akan mendirikan rumah di tapak tersebut berdasarkan kelulusan Pegawai Daerah. Dikhuatiri juga pengaruh seorang Penghulu yang disebarkan akan menjadi salah ditafsirkan penduduk Kampung, dan menggeruhkan lagi keadaan, makanya kami jadi mangsa.

Yang benar,

L.T.P.
(Hjh. Hajijah b. Bana)

s.k. Setiausaha Kerajaan Sarawak
Datuk Bandar, DBKU, Kuching
Pegawai Daerah Kuching
Penguasa Tanah dan Survei, Bahagian Kuching
Pengerusi Jawatankuasa Kemajuan dan Keselamatan Kampung
Penguasa Balai Polis Kpg. Gita.

Pengarah Badan Pencegah Rasuah,
Petitioner Surat 6000, Jalan Simpang Tiga,
93764 KUCHING.

Learned counsel for the appellant listed two grounds for the appeal:

a) That the trial judge had erred in law and fact in holding that the respondent have proven *prima facie* that the words complained of are defamatory in their natural and/or ordinary meaning and/or inferential meaning and/or innuendo meaning without properly applying the correct test in deciding the meaning of the said words; and

b) That the trial judge had erred in law and fact in coming to a decision by a mere fact that a copy of the letter (exh. P1) was copied to the ACA Kuching.

As to ground (a) the learned trial judge had found that the words used in P1 were defamatory of the respondent, and it became an actionable libel as the three ingredients are proven. The words complained of (i) are defamatory; (ii) referred to the respondent; and (iii) published to a third party. The ingredients (ii) and (iii) are undisputed. The trial judge had applied the correct test by quoting in extenso from the case of *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334 where Thean J applied the test as laid down by Lord Atkins in *Sim v. Stretch* [1936] 2 All ER 1237 at p. 1240 that the words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally. I am satisfied that the correct test had been applied, and the conclusion reached was correct. See also *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; *Abdul Rahman Talib v. Seenivasagam & Anor* [1965] MLJ 142.

As to ground (b), there were two defences of the appellant; *viz*., justification and fair comment. The learned trial judge was correct in her finding based on the facts that there was no merit in the first defence.

To succeed in the defence of fair comment the appellant must prove that:

i) the words alleged to be defamatory were comments and not statement of facts;

ii) there was a basis for the comment;

iii) the comment was of public interest; and

iv) it was made honestly and without malice.

It is not necessary that each of the facts pleaded in support is to be proven; all that is needed is to prove such of the facts as are sufficient to form the basis of a fair comment (see s. 9 of the Defamation Act 1957). The question to ask in this type of defence is whether on all these facts, a fair-minded person could honestly have come to the conclusion as the defendant did. The test is an objective one.

What is fair comment? Mere exaggeration or even gross exaggeration would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may be within the prescribed limit. Thean J in *JB Jeyaretnam v. Goh Chok Tong (supra)* quoted Lord Esher, MR's judgment in *Merivale v. Carson* [1888] LR 20 QBD 275:

> Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case.

At p. 340:

> The question which the jury must consider is this – would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that, then you must find for the plaintiff; If you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all.

The defence of fair comment on matters of public interest is to be distinguished from the defence of justification. These two defences are quite separate and different, and the burden of proof for each is different. As we are concerned with the defence of fair comments on matters of public interest, the defendant is not obliged to prove that the comments are true but are fairly and honestly made. This is clearly explained in the case of *Sutherland & Ors v. Stopes* [1925] AC 47 where Viscount Finely (at p. 62) said:

> The defence of fair comment on matters of public interest is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence there must, of course, be a basis of fact on which the comment is made.
>
> There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, (namely justification and fair comment), but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

Where the defendant has pleaded fair comment, to which the plaintiff has pleaded malice in reply, it is for the plaintiff to adduce evidence of fact and matters from which malice to be inferred. See *McCarey v. Associated Newspapers Ltd & Ors* [1964] 2 All ER 335.

In *Rajagopal v. Rajan* [1972] 1 MLJ 45 it was clearly stated that the defence of fair comment will fail if the libel is malicious. The test of malice has been summarised by the House of Lords in *Horrocks v. Lowe* [1975] AC 135; [1974] 1 All ER 662, that is, where the defendant knew the publication to be false or where the defendant made the publication recklessly, being indifferent to the truth of what he published and neither considering nor caring whether it was true or not or whether he knew the publication to be false.

In the instant case the appellant was able to prove ingredient (iv) in that she had acted honestly and without malice as she had not extended the letter P1 to the ACA. In other words, the letter P1 was never sent to the ACA although it was typed at the bottom of P1 that copies were sent to seven authorities, including the ACA.

It will be observed that the contents of the letter (P1) was entirely drafted by the appellant's son, which means that the words used in the letter were his and not the exact words of the appellant. The letter was read back to the appellant and she approved it. There is one important thing, that is, the said letter P1 (though copied to the respondent) a copy thereof was never in fact sent to the ACA. This is explained in the defence, she said (at p. 86 Appeal Record):

> My son wrote this letter on my behalf. I signed by thumb print. The letter was addressed to Ramli bin Usop. I do not intend to implicate the Penghulu with criminal offence. There was no allegation of Penghulu committing criminal offence. The issuance of this letter was to seek settlement over my problem.

This clearly is the evidence of her intention – she did not send P1 to the ACA. Later in her evidence she said (p. 88 Appeal Record):

> I started claiming Lot 609 one and a half year ago. I have rights over the land because I inherited it. This is proven by the fruit trees on the land which were planted by my grandfather.

Was it truly her intention to extend a copy of the letter P1 to the ACA? There is no evidence to show that it was her intention to send P1 to the ACA. This is clearly shown in the evidence. At p. 99 Appeal Record, she said in answer to a question by the learned counsel:

Q. What was your intention by extending a copy of exh. P1 to the various people at the bottom of the letter?

A. The copy of this letter was not extended to the ACA.

This last piece of evidence remained unchallenged. The pertinent question is whether the mere fact that it was typed at the foot of P1 which copy in fact was never sent and received by the ACA, sufficient to find a motive of malice? Bearing in mind that the appellant is an illiterate person, and that the letter P1 was prepared by her son it is reasonable to presume that it was never the idea of the appellant to extend a copy of P1 specifically to the ACA. For instance, if a person intends to commit an offence and changes his mind to do it, I do not think it is correct to say that this is indicative of his intention (which was never realised), and therefore he commits the offence. To constitute an offence, the Latin maxim is *actus non facit reum, nisi mens sit rea*.

The learned sessions court judge in her judgment (at p. 114 Appeal Record) said:

> Having perused the evidence adduced by both parties, I am satisfied that the statements in para. 3(a)(b)(d)(e) are fair comments on the facts truly stated. It is obvious that the matter on which the comments were made is one of public interest because it concerned a state land in a Kampung and the action of a public figure like Penghulu. I am also satisfied that a fair minded person would likely make such comment.

To my mind, the learned trial judge is being fair in this part of her judgment. But she found that the appellant was acting with malice on the assumption that P1 had been extended to the ACA which in fact was not. This is not sufficient to infer malice on the part of the appellant.

In this case, the respondent had not discharged the burden of proof that there is fact or facts, from which malice is inferred, *ie*, the sending of a copy of P1 to the ACA.

It seems to me the whole episode is merely a storm in a tea cup, the contents in letter P1 were fair comments as found by the learned trial judge (see above) and there is no evidence that P1 was in fact sent to and received by the ACA. The fact that the ACA people came to see the respondent, it was not in connection with P1 but on some other matters pertaining to illegal occupation of land by immigrants. Therefore, the court is satisfied that, on a balance of probabilities, P1 was never sent to the ACA. That being so, there is nothing from which to infer malice on the part of the appellant. See *Rajagopal v. Rajan (supra)*.

In my view, the letter P1 did not expressly state that the respondent had committed a criminal offence, *ie*, abusing his position or power as a Penghulu. The ingredients of a criminal offence have not been disclosed by P1. On the evidence of the case as a whole, the appellant has succeeded in her defence of fair comment, even if P1 amounted to defamation of the respondent. It appears that the respondent was over sensitive that when a villager questions his authority as a Penghulu *vis-a-vis* the district officer, a person higher in the hierarchy, he could not take it. To preserve peace and harmony in the kampung, the parties would have been wiser to settle matter of this nature by consultation *(musyawarah)* instead of bringing the case to court unless they have some other motives.

In the circumstances, I would allow the appeal with costs to the appellant.